
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street. N.W.
Washington, D.C. 20036

Case No. 83-ERA-12

In the Matter of

JAMES E. WELLS, JR.
Complainant

vs.

KANSAS GAS AND ELECTRIC COMPANY
AND ITS WOLF CREEK NUCLEAR
GENERATING PLANT IN BURLINGTON,
KANSAS
Respondent

Appearances:

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Before: MELVIN WARSHAW
Administrative Law Judge

RECOMMENDED DECISION

This is a proceeding brought under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 and the regulations promulgated thereunder at 29 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* The Secretary of Labor is empowered therein to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory commission (NRC) who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action that relates or seeks to have their employer fulfill safety and other requirements established by the Commission for the construction and operation of nuclear powerplants.

In this proceeding the Complainant is seeking job reinstatement, backpay and other relief from Respondent who allegedly disciplined, discharged, and refused to reemploy him for having at various times notified his supervisors of problems that could affect plant safety and disclosed discrepancies concerning the installation of electrical equipment subject to federal (NRC) compliance and enforcement standards. Complainant was terminated on August 4, 1983 and thereafter called the Arlington Regional Office of the Nuclear Regulatory Commission and asked it what action he should initiate with respect to his firing and the safety concerns that he had found during the course of his employment at the Respondent's Wolf Creek Plant (Tr. 140-141). He was told to report them to the Department of Labor (DOL) and that the Commission (NRC) would monitor the resulting proceeding conducted by DOL. (ALJ Exh. 2, Aug. 23, 1983)

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On September 26, 1983 (ALJ Exh. 1) following an investigation, DOL's Regional Director found the termination to constitute a violation of 42 U.S.C. § 5851 and directed Respondent to reinstate Wells and take other make whole remedial action. Respondent refused and requested the opportunity for this public hearing as provided by 42 U.S.C. § 5851(b)(2)(A).

Three days of hearings were conducted on January 12, 13, and 20, 1984 before the undersigned administrative law judge. The parties were represented by counsel and afforded a full and fair opportunity to adduce evidence in support of their respective positions concerning the factual and legal issues presented by this case. In addition, the parties submitted extensive post-hearing briefs on February 6, 1984 together with proposed findings of fact, conclusions of law and remedial relief. In these premises it was

impossible to comply with the regulatory time requirements for the handling of § 5851 whistleblower complaints and the parties agreed, with my approval, to waive any and all such requirements with the understanding that this recommended decision be issued on or before February 29, 1984 and that the Secretary's final decision be rendered 30 days thereafter (Tr. 284-284, 584).

In that the discrepancies and safety concerns brought out by Complainant were in conjunction with his job of quality assurance electrical inspector it was contended by Respondent that he was not engaged in protected activity under 42 U.S.C. § 5851 because there is "no allegation that the employee had commenced or was about to commence or was in any way involved as a witness in any proceeding or action pursuant to the Energy Reorganization Act or the Atomic Energy Act of 1954." This threshold contention may be summarily disposed of as follows:

> a. 42 U.S.C. § 5851 covers any and all employees of a nuclear facility regardless of their function.
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> b. 42 U.S.C § 5851 is applicable whether or not the employee commenced a proceeding under the Energy Reorganization Act. A contrary interpretation would remove employee protection even though it provides the

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> employer the first opportunity to deal with the complaint and eliminate the safety problem so as to be in compliance with NRC requirements.(*See* 42 U.S.C. § 5846 as it applies to directors and responsible officers with regard to substantial safety hazards and the requirement that they notify the NRC thereof). Non-compliance with NRC requirements subjects the nuclear employer to an enforcement proceeding so that the filing of a safety violation report can, in the absence of corrective action, result in the NRC prosecution and fine of the employer (*See* 10 CFR Part 50, App. B; 10 CFR § 50.100 and 50.110).
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> c. 42 U.S.C. § 5851(a)(3) prohibits employers of nuclear facilities from discrimination because the employee was "... about to commence or cause to be commenced a proceeding [for the administration or enforcement of any requirement imposed under this chapter) or *in any other action* to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended." (Emphasis supplied). The subject proceeding, albeit conducted by the Department of Labor, carries out the purposes of the Act, namely:
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> ...to increase the efficiency and reliability of use of all energy sources to meet the needs of present and future generations... to advance the goals of restoring, protecting, and enhancing environmental quality, and to assure public health and safety. (42 U.S.C. § 5801) and therefore broadly falls under the clause, "any other action."
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> d. 42 U.S.C. § 5851 is triggered whether the proceeding occurred before or after the discrimination against the employee had been meted out. *See Consolidated Edison Company v. Donovan*, 673 F.2d 61 (2nd Cir. 1982). Licencees of the NRC, such as the Respondent, cannot prohibit their employees from taking safety concerns to the NRC by firing them before they do so. One of

the safety problems identified by Complainant was with regard to the anchor bolt program that had not been corrected despite a previous NRC investigation

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resulting in a fourty thousand dollar fine of the Respondent. (c.f. Item c, above, that a report on safety violations may operate as the first step of a NRC proceeding). Indeed, Complainant's quality assurance inspection group was established because of this previous NRC investigation and fine (Tr. 366-371).

Chief Judge Morton in *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983) pointed out that ERA antidiscriminatory provision must be construed so as to prevent channels of NRC information from being dried up by employer intimidation. He likened the ERA to the National Labor Relations Act (NLRA) where a § 8(a)(4) violation is not dependent upon whether the employee provided information in the underlying NLRB proceeding (*Id* at p. 282 citing *NLRB v. Retail Store Employees Union*, 570 F.2d 586 (6th Cir., *cert. denied*). I find the *DeFord* analogy with the NLRA entirely appropriate. Limiting 42 U.S.C. § 5851 to situations where the employer admitted that it believed its employee was about to commence a NRC proceeding would make a nullity of the antidiscrimination provision. The test is not whether the employer admits the violation but whether the employer's disciplinary action was motivated by the protected activity of the employee. Motivation may be established directly or on a "but for" basis in accordance with the test established in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *NLRB v. Transportation Management Corp.*, 76 L. Ed 2d 667 (1983).

The Facts

Complainant is 27 years of age and was in military service between 1975 and 1978. Thereafter he was employed at various nuclear facilities as a quality control inspector for the set-up, control and installation of electrical equipment. In the military he completed the Electronic Systems Course in Huntsville, Alabama, and he has since been certified for employment in nuclear powerplants as a Level II electrical, dimensional and welding inspector. Prior to his employment at Respondent's Wolf Creek Power Plant he was granted security clearance at three nuclear plants (Tr. 79). The only difficulty he ever had was in substantiating two months of employment by Daniels International immediately after his military service (Exh. C-6).

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On or about April 25, 1983 Complainant was employed by Respondent as a walk-down inspector of electrical systems. His primary assignment was to determine whether installed equipment met the quality assurance standard of the Respondent as well as the NRC and to identify conditions which could affect personnel and plant safety and constitute areas of potential concern (Tr. 102; 139). Complainant worked a regular ten hour day, paid at the rate of $19.00 an hour plus time and a half for overtime, and

received $168 per week for living expenses (Tr. 96). At the time of his hire it was estimated by Respondent that his first year's salary would be in excess of twenty thousand dollars.

Complainant was interviewed for his job by William Rudolph, Manager of Quality Assurance, whose function was to implement safety-related and special scope activities by all organizations engaged in getting the Wolf Creek Nuclear plant ready to operate. Rudolph utilized the resume (Exh. R-1) provided by Volt Technical Services in accepting Wells for the job. The resume listed "J.C. Calhoun College Huntsville, AL, 1977, 20 hours credit in Electrical Systems" as well as employment at Daniels International. Neither the college credits nor the Daniels employment in 1978 were necessary to qualify Complainant as a walk-down electrical inspector in Respondent's quality assurance operations (Tr. 322, 326, Exh. C-10). Claimant's supervisor was Glenn Reeves, who was Assistant Manager of Quality Assurance under Rudolph.

We shall now set forth the events that are claimed to have brought about Complainant's termination on August 4, 1983. These events occurred under the backdrop of Complainant's work performance, and at no time was Wells ever criticized for failure to properly carry out the duties of his employment. All of the evidence in this case establishes that Wells was fully qualified to and did successfully perform his quality control inspection job. The events that are germane to the alleged violation of 42 U.S.C. § 5851 are all independent of his job performance except as his inspection activity enabled Complainant to discover and identify unsafe conditions and discrepancies which he communicated at various times to Reeves and/or Rudolph so that corrective action could be taken in compliance with the requirements of the

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NRC. These requirements are no less demanding than the quality assurance standards Respondent established for the electrical equipment Complainant inspected and evaluated.

Meeting With Respect To Qualification Record For Background Security Investigation

On or about June 3, 1983 Complainant, together with the twelve other quality assurance electrical inspectors, were called together and asked to complete Exh. R-2. Complainant asked Jean Hack, who was in charge of the procedure, how he should list the credits he was given by John Calhoun College as a result of a military course he had taken. Wells was told to put "it down just like that." (Tr. 188; Exh. C-5, Tr. 107; 210). Another of the inspectors, Calvert, also claimed credits from Eastern Kentucky university as a result of law enforcement work he performed and was also told by Hack to put it down (Tr. 211-212). In Wells' instance he inserted under the subject of education: "1977-J.C. Calhoun College - 20 Hrs. Credit - Credit for/toward Elec." (Exh. R-2, Part A). The qualification record he prepared was transferred to a Personal History Data sheet (Exh. C-

10) and constituted the basis for a background security investigation conducted by Equifax (Tr. 325-6), which the Respondent engaged for that precise purpose.

Safety Concerns Reported By Complainant Prior to Being Disciplined on June 20, 1983

On the morning of June 20, 1983 Complainant brought to Rudolph's attention a number of discrepancies and safety problems that he had identified in the course of carrying out his quality assurance inspection job (Tr. 108; 135). Complainant met with Rudolph at about 9 a.m. and pointed out the absence of quality control documentation whereby it could be determined whether the installation of equipment conformed to prescribed standards (Tr. 26-29; 53). In addition, Wells told Rudolph of outstanding and uncorrected generic deficiencies that included the lack of qualified inspection of the anchor bolt program (Tr. 30).

Respondent made much of the fact that the foregoing discrepancies and safety problems were not included in a "written report" until on or about July 13, 1983 (Exh. R-10).

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The safety information Complainant communicated to Rudolph on June 20, 1983 was based upon notes he had previously made (Exh. C-1). The "written report" (Exh. R-10) simply particularized the discrepancies and safety problems requiring corrective action.

Respondent attempted to denigrate the importance of the safety problems that Wells brought to its attention (Tr. 404). However, Respondent admitted that they were sufficiently important to have the supervisor of the inspection surveillance group research and investigate them and recommend corrective action by the organization responsible for having caused them (Tr. 406).

Section 5851 does not make the importance of that which is disclosed by the whistleblower the basis of a violation. Reports of an unsafe or hazardous condition and the corrective action taken therefor is subject to periodic inspection and/or disclosure to the NCR which may thereupon institute a proceeding against the licensee for not having complied with the administration or enforcement of the Commission's requirements. The authorship of a report concerning unsafe conditions may therefore be deemed as the first step in commencing or causing to be commenced a proceeding under Section 5851.

The Disciplinary Action Taken Against Complainant on June 20, 1983

Sometime during the afternoon of June 20, 1983 Wells was called into Rudolph's office. Present were Reeves, two security guards and the manager of Quality Assurance, Rudolph. The only reason for having the security personnel in attendance was for carrying out the discharge of Wells which Rudolph, Reeves and their supervisor Mr. Creek, had previously decided upon. (Tr. 491-493).

The meeting and its significance with regard to its relationship to the prohibitions contained in 42 U.S.C. § 5851 may best be appreciated by the sequence of topics and actions that took place before and after Wells apprised Respondent that he was being fired because of the quality safety concerns he had brought to Rudolph's attention. The sequence appears at pages 402 and 403 of the transcript as follows:

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JUDGE WARSHAW: Do you [Rudolph] mean you had this meeting and the first one to speak was Mr. Wells?

THE WITNESS: Your Honor, I was the first one to begin the meeting. I informed him why Mr. Wells was sitting in front of us, our concerns in regard to the three areas, specifically the damage to company property and the interface relation with our internal people and the people outside.

JUDGE WARSHAW: And then there came a point when you told him he was fired, is that right?

THE WITNESS: Yes, sir. I said --

JUDGE WARSHAW: (Interrupting) and at that point did he respond by saying you're telling me I'm fired, but the real reason is what I told you about certain quality concerns?

THE WITNESS: Yes, sir.

JUDGE WARSHAW: And in that sequence, is that correct?

THE WITNESS: Yes, sir.

JUDGE WARSHAW: And then you went out in the hallway, and you spoke to Reeves, and you decided to give him another chance, is that right?

THE WITNESS: No, sir: I stayed in my office with Mr. Reeves. Mr. Wells and the two Security Officers went outside my office.

The next thing that took place was calling Wells back into the office after about five minutes (Tr. 53). Rudolph denied that the meeting was called because Wells had brought his safety concerns to him (Tr. 56). And then the following occurred (Tr. 56-57):

JUDGE WARSHAW: And do you [Wells] recall that the meeting ended with their telling you, or Mr. Rudolph's telling you, that you were on probation?

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THE WITNESS: Yes, sir.

JUDGE WARSHAW: And that you had to keep your nose clean?

THE WITNESS: Yes.

JUDGE WARSHAW: And that unless you did, you would probably be let go?

THE WITNESS: He said if I got called up into his office for any other problems concerning these types of things [the three misconduct areas, identified by Rudolph] or whatever, have my bags packed, was his words.

When asked why the discharge action was rescinded, Rudolph answered (Tr. 400):

A. We asked Wells to step outside with the two security officers and Reeves and I met and discussed the responses Mr. Wells provided us [*before* the discharge action and not *after* the claim was made that the discharge was because

of the disclosure of safety concerns by Wells]. And we decided to let him have another chance.

Q. Was there anything specific which you discussed with Mr. Reeves which led to your giving Mr. Wells another chance?

A. When he said that he didn't have any interface. problem with the other organizations I wanted to give him the benefit of the doubt, because I had not been approached, specifically, by the other organizations that he had an interface problem with them.

The interface problem had been completely aired and discussed by Rudolph, Reeves and Wells. In the face of the categorical denial by Wells that he had any such problem Rudolph responded by discharging him. It was only then that the subject of safety concerns was raised. Nothing else

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occurred between the time Wells was directed to leave Rudolph's office as a discharged employee and the time he was called back into the office and told that he was subject to immediate termination in the event of any reoccurrence of the misconduct which brought about the disciplinary meeting.

Highly "sanitized" minutes were prepared by Reeves immediately following the June 20, 1983 meeting (Exh. R-4) wherein the action was described as "Reprimand of James Wells" in that Wells was informed by Rudolph that he "would not tolerate continued problems" and that Complainant acknowledged same with the explanation that "KG&E's perceptions of his conduct were negatively exaggerated." Significantly, the minutes made no mention that Well's response to the three items of misconduct, viz:

1. failure to establish a favorable relationship with other persons within the walkdown group.

2. failure to establish a favorable relationship with external organizations (i.e. Daniels).

3. damage to a telephone located in the KG&F QA walkdown group area.

was wholly rejected and that discharge action was summarily taken despite Respondent's disciplinary procedures calling for progressive discipline (Tr. 389). The most significant aspect of the minutes is what they fail to disclose, namely: (a) Wells' accusation that the discharge action was because he had communicated his safety concerns that morning to Rudolph; (b) the five minutes recess that was called by Rudolph and Reeves to consider the situation; (c) Rudolph's denial that the meeting was called because Wells had placed Respondent on notice of discrepancies and safety concerns; and (d) changing the discharge action to one that placed Wells on probation subject to immediate discharge.

<u>The Period From June 20, 1983 Through August 4, 1983 When Wells Was Discharged</u>

During this fourty-four day period there was no evidence

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of misconduct or any claim that Wells was in any way insufficient in performing his job duties. Whatever difficulty Wells had with regard to his interrelationship with others was in no respect manifest. Sometime during the middle of July Wells brought additional quality assurance/safety concerns to Rudolph's attention and inquired as to what progress was being made with regard to those he had identified and made known on June 20, 1983 (Tr. 60; 295-396; Exh. R-7).[1]

The events during this period that culminated in the discharge of Complainant were with regard to the background investigation conducted by Equifax, a firm under contract with Respondent to conduct inquiries for the granting of clearance at its nuclear power plant. Such clearance was necessary for Wells to be issued an unescorted badge at the time that fuel loading, scheduled for August of 1984, occurred (Tr. 152). The investigative report (Exh. R-5) shows that inquiry concerning Wells' previous employment was sent out between July 8 and July 28, 1983; that a criminal court record check at residences listed by Wells was sent out on July 8, 1983; that request was made of John Calhoun State Community College for a transcript, and Equifax was asked by said College on July 13, 1983 to indicate at which of its schools the 20 credit hours were granted; and that reports were being received from personal references by the middle of July. A notation appears that Wells was contacted by telephone on July 20, 1983 for additional personal references and that he supplied the names of two additional persons on July 21, 1983.

It was not until August 2, 1983 that Wells was told that the educational credits he claimed from Calhoun College and his employment at Daniels could not he verified; and that unless he provided proof thereof on or before August 5, 1983 he would be terminated (Tr. 310; Exh. R-8; 412-413).[2] The three day period provided to obtain such information is difficult to comprehend since it was not until August 23, 1983 that Equifax completed its investigation of Wells (Exh. R-5; Tr. 229) and it was not until August of 1984 that the nuclear fuel load would be in place so as to require clearance for an unescorted access badge (Tr. 341).

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The ultimatum to provide background verification was also unprecedented (Tr. 415). Mr. Souders listed in his personnel history sheet attendance at the University of Kansas and the acquisition of a high school GED degree from Missouri. Neither were verifiable but Souders was not terminated. Both Souders and Wells became Q/A inspectors at the same time and worked in the same crew. Unlike Wells, Souders was given the opportunity to obtain a Kansas GED degree and his university credits were waived even though they could not be substantiated (Tr. 171-172; 177- 178).

After the "ultimatum meeting" of August 2, 1983 Reeves decided that Wells had engaged in deception as to the 20 hours of credit from John C. Calhoun College and, with

the concurrence of Rudolph[3] , that Wells should be terminated instead of waiting for Wells to provide verification the following day (Tr. 519). The head of security, Johnson, was informed by Rudolph on the morning of August 4, 1983 that he had decided to terminate Wells because he was satisfied that Wells was not going to be able to produce documentation that he attended Calhoun College (Tr. 346-347).

Contemporaneously with the termination decision of August 4, 1983 Wells submitted a written report concerning inadequate installation of the cable program (Exh. C-3 and 4). Rudolph stated he did not receive the report until the following day (Tr. 418) because it was date-stamped by his secretary August 5, 1983 and he does not go home until he checks out everything that comes in during the day (Tr. 418). Wells testified that he turned handwritten notes over for typing on the morning of August 4, 1983 which he identified as the safety discrepancies contained in Exh. C-2 (Tr. 72). Reeves corroborated the fact that Wells placed Respondent on notice of additional safety and quality assurance discrepancies on the day he was discharged, as follows (Tr. 528-530):

> Q. When was the first time you saw that [Exh. C-2] as best as you recall?
> A. August 4.
> Q. Where did you see that, sir?

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> A. I found it in the typing basket near my office.
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> **********
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> Q. What did you do with this report?
> A. I took it out of the typing basket and placed it on my desk.
> Q. Why did you do that?
> A. Because I recognized it as a list of discrepancies that we would want to follow up, in order to assure that we had followed every one of Mr. Wells' concerns *and to he able to show* that we followed up Mr. Wells' concerns, it would be preferable to have his concerns in his own handwriting versus typewritten form without his signature.
> Q. What, if anything, did you do with that report?
> A. I gave it to Mr. Rudolph.
> Q When did you give it to Rudolph, sir?
> A. August 5.
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> **********
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> JUDGE WARSHAW: When you say you gave it [referring to the handwritten report] to Mr. Rudolph on August 4, was that in a photocopy or was that a typed copy?
> THE WITNESS: It was a handwritten copy. I gave Mr. Rudolph that one that had been handwritten; and I don't--it was my recollection that it was --
> JUDGE WARHAW (interrupting); Did you make a photocopy of it?
> THE WITNESS: No, sir.

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The Discharge on August 4, 1983 and Respondent's Refusal to Reemploy

At the beginning of the workday, August 4, 1983, Wells told Reeves he had to send home (Alabama) for the documentation he had been directed to provide the following day and he wanted to ask Rudolph for additional time (Tr. 71-75). Around noon Reeves informed Wells that he could not have a meeting with Rudolph, who had informed him that the August 5 deadline was not his but Wells' problem. [Actually Rudolph told Reeves that he would not meet since it was Wells' last day and did not want to expend any more time because of Wells (Tr. 524)] Upon the completing of the work day Wells asked Reeves why Rudolph could not get together with him. Reeves stated he did not know but that he (Wells) should not have listed Calhoun (Tr. 74-75; 522-523). On the way out Wells was stopped by chief security officer Johnson and told to report to Reeves' office. Both Rudolph and Reeves were there as well as two security guards. Rudolph told Wells he was terminated because he was unable to verify his background information (Tr. 76; 408). When Wells stated that the verifying information was on the way he was told by Rudolph that termination was unavoidable because of security requirements (Tr. 76).

The following day Reeves called the entire Quality Assurance Group together and announced that Wells had been fired because of his failure to verify background information (Tr. 200; 213; 577).

Approximately two weeks later Wells provided Respondent confirmation (Tr. 532) of the college credit equivalency granted him by John Calhoun College (Exh. C-5) and the 1978 wage and tax statement Daniels had issued to him (Exh. C-6; Tr. 80). Wells called Johnson after the receipt of this documentation and asked if he could have his job back now that all the background information had been supplied. Johnson's only response was that Wells would be given a good reference (Tr. 90-81).

During the hearing (Tr. 537-538) Reeves was asked by Respondent's attorney:

> Q. Knowing what you know today, would you hire Mr. Wells as a member of your walkdown group?
> A. No, sir.

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The verifying information (Exhs. C-5 and 6) was provided Respondent before the Equifax background investigation had been completed (Exh. R-5) and it was therefore within Respondent's power to fill these two unconfirmed areas (Calhoun and Daniels) with the documentation Wells provided. It did not, and Respondent has at all times continued to refuse to rehire Wells. No evidence whatsoever was submitted showing the necessity of corroborating Wells' background with regard to his acquisition of college credits or his employment at Daniels. Only a high school education was required for Wells' employment as a quality assurance inspector and only five years of previous employment was subject to the back- ground investigation. Neither was there any showing of urgency to complete the background investigation in that the nuclear fuel load

was scheduled for August of 1984. I find that the three days given Wells on August 2, 1983 to produce documentation with respect to Calhoun and Daniels was an attempt to create "business reasons" for his termination. It was in fact staged to bring Wells, probation to an end.

Nuclear Regulator Commission Considerations

Regulations at 10 C.F.R. Part 50, App. B require that quality assurance criteria be set up for all nuclear plants. The regulations make clear the need for stringent guidelines to adequately protect against potential dangers of nuclear radiation and require that measures be established for identification and control of materials and to assure that inspections such as those conducted by Complainant be accomplished by qualified personnel. Indeed, Complainant's quality assurance walkdown group was formed because of the NRC audit of Respondent's quality assurance practices and the fine assessed against it was for allowing discrepancies to exist that were unidentified as of the turnover of the plant from the constructors (e.g. Daniels) to the owner (KG&E) (Tr. 149-145; 572-573). The quality assurance practices of a licensee such as Respondent are subject to regular audit by the NRC and the safety and discrepancy reports filed by Complainant in this case may constitute the basis for a NRC compliance proceeding.

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Conclusions

The disciplinary action that placed Wells on probation ultimately lead to his discharge as well as the failure of the Respondent to reinstate him after all of the requested verification was supplied. Each of these events must be evaluated with the one that either preceded or followed it in that they represent discrimination in violation of 42 U.S.C. § 5851, from their origin to their ending. *Field v. Charnette Fabric Co.*, 254 N.Y. 139 (1927, J. Cardozo).

The discharge action of June 20, 1983 was taken contrary to Respondent's progressive disciplinary policies. At no time was Wells counseled, warned, or otherwise placed on notice that he had engaged in conduct that Respondent deemed to constitute the basis of discipline. The alleged failure to establish favorable working relationships with others was in no respect supported by any investigation conducted by Respondent before Wells was discharged on June 20, 1983. Wells was called into Rudolph's office for the express purpose of terminating him. The security guards were present to escort him from the plant property once that was done. The discharge action was preceded with accusations concerning the way Wells was getting along with Poundstone and Calvert and his having threatened one of Daniels' inspectors while in the document control room. Wells was allowed to explicate his relationship and dealings with each of these persons and to point out that the telephone he had damaged was merely an accident. All of Wells' explanations, denials, and excuses were rejected and deemed insufficient as evidenced by Respondent's response: to announce that he was finally terminated. There is no question

that this termination action would have concluded the meeting if Wells had not then interposed his belief that he was really being discharged because of the safety concerns that he had identified for Rudolph earlier that day. For the purpose of 42 U.S.C. § 5851 the finding of discrimination is predicated upon whether the discharge or lesser discipline was intended to restrain, intimidate or coerce the employee from identifying quality assurance discrepancies and practices for which his employer would be required to account pursuant to regulation of the Nuclear Regulatory Commission contained in 10 C.F.R. Part 50, App. B.

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It is patently obvious that Respondent declared a recess instead of directing the security guards to escort Wells from the plant as a discharged employee because of its concern that the action it had concluded would be found to have violated 42 U.S.C. § 5851. I specifically reject the explanation that Respondent rescinded its discharge of Wells to give him another chance. The only credible explanation for changing the discipline from discharge to probation was the discovery by Wells of quality assurance discrepancies and Respondent's manifest purpose of separating that discovery from the discharge action it wanted to take against him.

The events that led to the August 4, 1983 discharge must be reviewed under the backdrop of the unlawful disciplinary action that took place only forty-four days before.

The preponderance of the evidence establishes and I find that the scenario devised to reconvert Wells' probationary status to one of discharge was with regard to the background investigation conducted after June 20, 1983 to provide Q clearance for the quality assurance inspectors. The investigation centered on college credits claimed by Wells and his 1978 employment at Daniels -- both of which were immaterial and unnecessary to his underlying employment. It was not until August 2, 1983 that Respondent advised Wells that Equifax had been unable to verify these two items. In doing so Respondent gave Wells three days, or until August 5, 1983, to produce documentation that would establish his entitlement to claim these background accomplishments. At the August 2, 1983 meeting that produced this deadline, Wells made it clear -as he had in early June when he inquired of Hack how he should set out college equivalency credit hours for the technical course he completed in the service -- that he had not attended John C. Calhoun Community College. By converting the requisite education verification to actual attendance instead of 20 hours of equivalent college credit Respondent was demanding the impossible of Wells and made the three days to respond of no value. Accellerating the deadline to a mere two days because Wells had identified the nature of his college credits during the meeting makes it clear that verification of his employment at Daniels was abandoned as still another requirement for his continued employment.

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In *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905 (9th Cir. 1981) it was held that "Where the employer's asserted justification is shifting and unreliable, its case is weakened, and ... the true reason ... for union activity (here, whistle- blowing) is correspondingly strengthened," and in *NLRB v. Transportation Management Corp., supra* at 676, it was held that when an employer violated the statute (here, placing Wells on probation) "[i]t is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he created the risk and because the risk was not created by innocent activity but by his own wrongdoing."

I find that Wells engaged in no deception in claiming college credit entitlement. Indeed, Equifax would have been so advised if it responded to the inquiry made by Calhoun on July 13, 1983 as to whether the credits were acquired at its junior or technical college (Exh. R-5; Exh. R-8, Item F).

I credit Wells' testimony that on August 2 and 4, 1983 he once again brought to Respondent's attention discrepancies including those relating to the inadequate installation of its cable program (Exh. R-9 and 10) and thereby made Respondent subject to a NRC compliance proceeding unless corrective action was taken prior to the time the discrepancies were disclosed by audit or otherwise. Date-stamping Wells' report as of August 5, 1983 (Exh. R-9 and 10) was a crude attempt to make its receipt appear to be unrelated to the termination action that was taken on August 4, 1983. Reeves' testimony at pp. 528-530 of the transcript admits that he saw and understood the significance of Wells' pre-termination discrepancy report when he stated that he saw it on August 4, 1983, in the basket for typing and that he preserved it in its original handwritten form " ... to be able to show that we followed up Mr. Wells' concerns [and] to have his concerns in his own handwriting versus typewritten form without his signature." This admission and the deception attempted as to the date of its receipt makes abundantly clear that the disciplinary action at the end of the day arose out of the new and additional discrepancies which Wells brought to light and Respondent's concern that its discharge of Wells would become subject to a discrimination and/or compliance proceeding under the ERA. Accordingly, I find the discharge on August 4, 1983 for claiming college credits a pretext to get rid of Wells and a further act of discrimination in

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violation of 42 U.S.C. § 5851.[4]

Respondent's alleged business reasons were pretextual inventions and in violation of the prohibitions contained in 42 U.S.C. § 5851. It is therefore not necessary to determine whether Respondent met its burden of demonstrating that some disciplinary action would have taken place even in the absence of Wells' protected conduct.

Assuming *arguendo* that security clearance considerations required Wells to be terminated on August 4, 1983 he did provide documentation of his college credits and Daniels employment within two weeks thereafter and before Respondent's (Equifax)

background investigation had been completed. 29 C.F.R. § 24.2 lists among the prohibited acts "terms, conditions, or privileges of employment," and in addition protects the whistleblower from being blacklisted. No defense has been interposed by Respondent concerning its refusal to reemploy and reinstate Wells to employment despite its receipt of proofs upon which it allegedly predicated its decision to no longer employ Wells. Refusal to reemploy under the foregoing circumstances is tantamount to blacklisting. It also makes clear the insubstantial basis for Respondent's August 4 termination which I have found herein to be pretext and an independent violation of 42 U.S.C. § 5851.

Remedy

Under the authority contained in 42 U.S.C. § 5851(b)(2)(B) it is recommended that the Secretary of Labor direct the Respondent, Kansas Gas & Electric Company, to abate the violations found herein and provide the following relief as necessary to effectuate the purposes of the Energy Reorganization Act and its employee protection provisions:

1. reinstate Complainant, James E. Wells, Jr., to his former or to a substantially equivalent quality assurance inspection position;

2. pay to Complainant, James E. Wells Jr., all wages and compensation (including the $168.00 per week stipend) that he would have received except for the discharge action of August 4, 1983;

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3. pay interest on the amount of wages and compensation provided in item 2 above at the rate prescribed by 28 U.S.C. 1961;

4. expunge from its records all memoranda and or reference to the disciplinary action taken against Complainant, James E. Wells, Jr., as well as any reference of its refusal to reemploy him after August 4, 1983;

5. post on the bulletin boards of its Wolf Creek Generating Plant facility in Burlington, Kansas a copy of this order for a period of thirty days; and

6. pay to Complainant's attorneys, Guy, Helbert, Bell & Smith, all costs and expenses advanced by them in bringing this complaint as well as their reasonable attorney fees which have as of February 6, 1984 amounted to $20,221.63.

MELVIN WARSHAW
Administrative Law Judge

Dated: February 27, 1984
Washington, D.C.

MW:pac

[ENDNOTES]

[1] It was not until December of 1983 that a quality assurance audit was instituted with regard to the anchor bolt deficiencies that Wells identified (Tr. 223). Some of the discrepancies had not been addressed as of the date of this hearing.

[2] When requested on August 2, 1983 if the courses were at John C. Calhoun's Junior or Technical Colleges (Exhs. R-5 and 8) Wells explained that he was claiming 20 hours credit equivalence that the College had granted him for completing technical courses while in the army (Exh. C-3; Tr. 312; 347-348). Employment at Daniels fell outside the purview of the background investigation which is normally limited to the previous five years (Tr. 322).

[3] According to Rudolph the decision to terminate Wells resulted from a discussion with Reeves during the morning of August 4, 1983 (Tr. 416).

[4] The termination action was also unlawful in that it represents invidious treatment of Wells as compared to other employees who were also unable to corroborate their educational credits. Whether or not this difference in treatment was because Wells was on probation or because he filed a new discrepancy/safety report is immaterial in that either of these two grounds constitutes unlawful discrimination in violation of 42 U.S.C. § 5851.